159 U.S. 660

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 771.

THEODORE LAMBERT, APPELLANT,

vs.

GEORGE BARRETT, SHERIFF OF THE COUNTY OF CAMDEN, IN THE STATE OF NEW JERSEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

FILED OCTOBER 12, 1895.

(16,061.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 26, 1895.

1 To the judges of the circuit court of the United States for the district of New Jersey:

The petition of Theodore Lambert, a citizen of the United States, being a citizen of the State of New Jersey and of the county of Camden, in said State, respectfully shows unto your honors that he is unlawfully imprisoned and restrained of his liberty by confinement in the county jail, situate at Camden, in said county, by George Barrett, sheriff of said county and keeper of said county jail, contrary to law and in violation of the Constitution of the United States and the statutes of the United States.

The facts concerning the detention of your petitioner and the claim or authority by virtue of which he is so detained are as follows:

Your petitioner was convicted of the murder of William Kairer on June 15th, 1894, in the court of oyer & terminer and general jail delivery of the county of Camden aforesaid; that on the 13th day of October, 1894, the judgment of said court was pronounced upon your petitioner, by which it was ordered that said petitioner should be taken to said county and there safely kept until December 13th, 1894, when he was to be hanged by the neck until his body was dead; that on December 4th, 1894, a reprieve was granted by the Hon. George T. Werts, gove-nor of the State of New Jersey, suspending the execution of the judgment so as aforesaid given against said petitioner until the 3rd day of January then next; that on December 22nd, 1894, the gove-nor aforesaid issued a certain death warrant to the said George Barrett, sheriff, commanding him to execute said petitioner on January 3rd, 1895.

2 And your petitioner further shows that on December 28th, 1894, a petition was presented to the Hon. George M. Dallas, judge of the circuit court of the United States for the district of New Jersey, for a writ of *habeas corpus* to examine into the cause of the detention of said petitioner upon the claim that the said judgment, reprieve, and death warrant were void under the Constitution of the United States, and such proceedings were thereupon had that an appeal was duly allowed to the Supreme Court of the United States from a decision of said judge in the premises, and at the same time, to wit, January 2nd, 1895, an order was made by Mr. Justice Shiras staying said execution until the further order of the Supreme Court of the United States (a copy of which said order is hereto annexed and made part of this petition), which said order is still in full force and effect, the same not having been vacated or discharged, and that final judgment in said proceeding has not been entered and no mandate of said Supreme Court has been filed or made part of the record of the said United States circuit court upon which final judgment in said proceedings could be entered.

Your petitioner further shows that on May 28th, 1895, the gove-nor, as aforesaid, issued another certain death warrant to said George Barrett, sheriff, commanding him to execute said petitioner on June 27th, 1895 (a copy of which death warrant is hereto an-

nexed and made part of this petition); that by force of section 766 of the Revised Statutes of United States any proceedings to carry out said judgment by or under the authority of the State of New Jersey before final judgment should be entered in said proceedings in said circuit court were null and void; but said gove-nor
3 then and there disregarded the same and thereupon issued the aforesaid warrant of execution to the said George Barrett, sheriff, who now holds said petitioner and restrains him of his liberty for the purpose of carrying said death warrant into execution in violation of said statute of the United States.

And your petitioner further shows that article five, section nine, of the constitution of the State of New Jersey provides that "the governor or person administering the government shall have power to suspend the collection of fines and forfeitures, and to grant reprieves to extend until the expiration of a time not exceeding ninety days after conviction, but their power shall not extend to cases of impeachment."

That the said governor had no prerogative, right, or authority under and by virtue of the constitution and laws of New Jersey to grant said reprieve or issue said death warrants, and that the same is illegal and unlawful and in violation of the laws and Constitution of the United States.

Your petitioner further shows that on the 5th day of June, 1895, a petition was presented to the supreme court of New Jersey for a writ of *habeas corpus* to inquire into the cause of the detention of said petitioner, and that the same was granted and made returnable on June 10th then next, and after hearing argument said court held that said petitioner was lawfully in custody, but neglected and refused to pass upon the Federal questions herein presented; that subsequently application was made to the chancellor of this State for a writ of error to remove said last-mentioned judgment to the court of error and appeals, and the same was refused.

And your petitioner further shows that said death warrant
4 is in the nature of a new sentence which cannot be done without the presence of said petitioner and places petitioner twice in jeopardy of his life; all of which is contrary to and in violation of the Constitution and laws of the United States.

Your petitioner therefore prays this honorable court do forthwith issue the writ of *habeas corpus* to the said George Barrett, sheriff as aforesaid, requiring him to produce the body of said petitioner before this court at some time to be designated in said writ, there to abide what shall be awarded by said court in the premises.

The petitioner above named, being duly sworn according to law, upon his oath saith that the allegations contained in the foregoing petition are true.

THEODORE LAMBERT.

Sworn and subscribed to before me this 17th day of June, A. D. 1895.

WM. D. HOFFMAN, *M. C. C.*

5 By the Honorable George Shiras, Junior, justice of the Supreme Court of the United States, to George Barrett, sheriff of the county of Camden, in the State of New Jersey:

Whereas Theodore Lambert has lately appealed to the Supreme Court from a judgement lately rendered in the circuit court of the United States for the district of New Jersey in favor of you, the said George Barrett, sheriff of the county of Camden, in the State of New Jersey;

And whereas the said Theodore Lambert is to be executed and hanged on the third day of January next by virtue of a certain death warrant issued by the Honorable George T. Werts, governor of the State of New Jersey, to the said George Barrtett, sheriff as aforesaid:

You are therefore hereby cited to appear before the Supreme Court of the United States, at the city of Washington, on the 4th day of March next, to do and receive what may appertain to justice to be done in the premises.

And it is further ordered that the execution of the said Theodore Lambert be, and the same is hereby, stayed until the further order of the court.

Given under my hand at the city of Washington, in the *city of Washington*, the 2nd day of January, in the year of our Lord one thousand eight hundred and ninety-five.

GEORGE SHIRAS, Jr.,
Associate Justice of the Supreme Court of the United States.

Endorsed: United States Supreme Court. Theodore Lambert, appellant, *vs.* George Barrett, sheriff, appellee. Citation. John L. Semple, attorney.

6 STATE OF NEW JERSEY.

(Vignette.)

George T. Werts, governor of the State of New Jersey, to our sheriff of our county of Camden, Greeting:

Whereas Theodore Lambert, heretofore convicted in said county of Camden of the crime of murder in the first degree and by the judgment of the court of oyer & terminer and general jail delivery of said county sentenced to be hanged by the neck until dead, was by my order bearing date the fourth day of December, eighteen hundred and ninety-four, to you directed and delivered, duly reprieved and the execution of the said sentence against him suspended until the third day of January, eighteen hundred and ninety-five, or until you are further directed by me;

And whereas it is provided by law that when a reprieve shall be granted by the governor to any convict sentenced to the punishment of death and such convict shall not be pardoned it shall be the duty of *of* governor to issue his warrant to the sheriff of the proper county commanding him to execute the sentence at such time and place therein to be appointed and expressed;

And whereas by my warrant to you directed and delivered, bearing date the twentieth day of December, eighteen hundred and ninety-four, you were directed that on the said third day of January, eighteen hundred and ninety-five, between the hours of ten o'clock in the forenoon and three o'clock in the afternoon, you should proceed according to law to execute the said sentence of the said court upon the said Theodore Lambert by hanging him by the neck until he be dead;

7 And whereas, by reason of certain proceedings had and interposed by and in behalf of the said Theodore Lambert, the said sentence of said oyer & terminer and general jail delivery imposed on said Theodore Lambert has been hitherto delayed and remains unexecuted, notwithstanding the command of my said warrant;

And whereas the said Theodore Lambert has not been pardoned and no reason now appearing why said sentence should not be carried out:

Therefor- know you that by virtue of the authority vested in me by the constitution and laws of this State I do hereby further command you, the said sheriff, that on Thursday, the twenty-seventh day of June, A. D. eighteen hundred and ninety-five, between the hours of ten o'clock in the forenoon and three o'clock in the afternoon of that day, you do proceed according to law to execute the sentence of the said court upon the said Theodore Lambert by hanging him by the neck until he be dead.

Hereof fail not; and for so doing — shall be your sufficient warrant.

Given under my hand and the great seal of the State of
[L. S.] New Jersey, at Trenton, this twenty-eighth day of May, eighteen hundred and ninety-five.

GEORGE T. WERTS.

By the governor:

HENRY C. KELSEY,
Secretary of State.

8 Endorsed: United States circuit court for the district of N. J. Theodore Lambert, petitioner, *vs.* George Barrett, sheriff. On petition for writ of *habeas corpus*. John L. Semple, attorney. Upon consideration of the matters set up in the within petition I am of opinion that the petitioner is not entitled to a writ of *habeas corpus*, and therefore I deny the petition. In open court June 18, 1895. Edw. T. Green, J. Filed June 18, 1895. S. D. Oliphant, clerk.

9 In the Circuit Court of the United States for the District of New Jersey.

THEODORE LAMBERT, Plaintiff and Appellant, *vs.* GEORGE BARRETT, Sheriff, Defendant and Appellee. } Petition and Allowance of Appeal.

The above-named plaintiff, Theodore Lambert, considering himself aggrieved by the judgment entered on this eighteenth day — June, A. D. 1895, in the above-entitled proceedings, doth hereby appeal from said judgment to the Supreme Court of the United States, and he prays that this appeal be allowed and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

JOHN L. SEMPLE,
Attorney for Pl'tf and Ap'l't.

And now, to wit, on the eighteenth day of June, A. D. 1895, this appeal is taken and allowed as prayed for by and in pursuance of the statute in such case made and provided.

EDW. T. GREEN, *J.*

Endorsed: United States circuit court, district of New Jersey. Theodore Lambert, pl'tf & app'l't, *vs.* George Barrett, sheriff, def't & app'lee. Petition and allowance of appeal. John L. Semple, attorney. Filed June 18, 1895. S. D. Oliphant, clerk.

10 By the Honorable Edward T. Green, judge of the district court and *ex officio* judge of the circuit court of the United States for the district of New Jersey.

To George Barrett, sheriff of the county of Camden, in the State of New Jersey:

Whereas Theodore Lambert has lately appealed to the Supreme Court of the United States from a judgment lately rendered in the circuit court of the United States for the district of New Jersey made in favor of you, the said George Barrett, sheriff of the county of Camden, in the State of New Jersey;

And whereas the said Theodore Lambert is to be executed and hanged on the twenty-seventh day of June, instant, by virtue of a certain death warrant issued by the Honorable George T. Werts, governor of the State of New Jersey, to the said George Barrett, sheriff as aforesaid:

You are therefore hereby cited to appear before the Supreme Court of the United States, at the city of Washington, on the seventeenth day of July next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Trenton, the eighteenth day

of June, in the year of our Lord one thousand eight hundred and ninety-five.

EDW. T. GREEN, *J.*

Service of a copy of the above citation is hereby acknowledged this twentieth day of June, A. D. 1895.

GEORGE BARRETT, *Sheriff.*

[Endorsed:] 8–288. United States Supreme Court. Theodore Lambert, appellant, *vs.* George Barrett, sheriff, appellee. Citation. John L. Semple, attorney. Filed Jun- 24, 1895. S. D. Oliphant, clerk. June 24.

11 In the Supreme Court of the United States, October Term, in the year of our Lord one thousand eight hundred and ninety-five.

THEODORE LAMBERT, Plaintiff and Appellant,
vs.
GEORGE BARRET, Sheriff, Defendant and Appellee. } Assignment of Errors.

Afterwards, to wit, on the — day of June, A. D. eighteen hundred and ninety-five, in this same term, before the justices of the Supreme Court, at the Capitol, in Washington, District of Columbia, comes the said Theodore Lambert, by his attorney, John L. Semple, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

In refusing to issue the writ of *habeas corpus* as prayed for.

Whereas by the law of the land the judgment ought to have been given for the plaintiff against the said defendant, and that the said plaintiff prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing.

And that he may be restored to all things which he hath lost by occasion of the said judgment.

JOHN L. SEMPLE,
Attorney for Plaintiff in Error.

Endorsed: United States Supreme Court. Theodore Lambert, pl'tiff and app'l't, *vs.* George Barrett, sheriff, def't and app'll'e. Assignment of errors. John L. Semple, attorney. Filed June 18, 1895. S. D. Oliphant, clerk.

12 UNITED STATES OF AMERICA, } ss.:
District of New Jersey, }

I, S. D. Oliphant, clerk of the circuit court of the United States for the district of New Jersey, do hereby certify that the foregoing is a full, true, and complete transcript of the record in the cause of Theodore Lambert against George Barrett, sheriff, as the same appears on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Trenton, in said district, this sixteenth day of July, A. D. 1895.

[The Seal of the U. S. Circuit Court, Dist. of New Jersey.]

S. D. OLIPHANT, *Clerk.*

Endorsed on cover: Case No. 16,061. New Jersey C. C. U. S. Term No., 771. Theodore Lambert, appellant, *vs.* George Barrett, sheriff of the county of Camden, in the State of New Jersey. Filed October 12th, 1895.

Supreme Court U. S.
OCT 21 1895
JAMES H. MCKENNEY,

Supreme Court of the United States.

THEODORE LAMBERT,

Appellant,

Against

GEORGE BAKKETT, SHERIFF OF CAMDEN COUNTY, N. J.

Appellee.

OCTOBER TERM, 1895.

No. 771

MOTION TO ADVANCE.

Appeal from Circuit Court of the United States for the District of New Jersey.

WILSON H. JENKINS,

Attorney for Appellee, and Prosecutor of the Pleas.

Supreme Court of the United States.

THEODORE LAMBERT, Appellant, Against GEORGE BARRETT, SHERIFF OF CAMDEN COUNTY, N. J. Appellee.	OCTOBER TERM, 1895. No. 771. MOTION TO ADVANCE.

Comes now the Appellee, by his council appearing in that behalf, and moves the Court to advance the above entitled cause upon the calendar.

WILSON H. JENKINS,
Council for the Appellee for the purpose of this motion.

STATEMENT OF FACTS.

Theodore Lambert, the appellant, was indicted at the January Term, 1894, of the Court of Oyer and Terminer and General Quarter Sessions of the Peace, of Camden County, New Jersey, for the murder of William Kairer, who was murdered in the City of Camden, December 4th, 1893.

He was tried and the jury found him guilty of murder in the first degree, June 15th, 1894. He was sentenced to be hanged on the 13th day of December, 1894.

An appeal was taken to this Court returnable at the March Term, 1895, and the same was duly heard and dismissed and a mandate was duly issued thereon.

The Honorable George T. Werts, Governor of New Jersey, issued a death warrant commanding Sheriff Barrett to hang Lambert on June 27th, 1895.

An application was made to the Supreme Court of New Jersey for a writ of habeas corpus upon which the following order was made :

NEW JERSEY SUPREME COURT.

THEODORE LAMBERT, Petitioner, and GEORGE BARRETT, SHERIFF, &C., Defendant.	ON WRIT OF HABEAS CORPUS. ORDER.

The writ in this cause having been returned into Court, the production of the body being waived, and the cause having been heard by the Court, the Court on the eleventh day of June, 1895, doth adjudge that the warrant of the Governor was properly issued, and that from the return to the writ and the facts appearing to the Court, the prisoner is properly in custody and his discharge is refused.

Let this rule be entered in the minutes of the Court, June 11th, 1895.

B. VAN SYCKEL,
Justice Supreme Court.

On the eighteenth day of June, 1895, Lambert made an application to the Honorable Edward T. Green, for a writ of habeas corpus, and upon the refusal to grant the same he took an appeal to this Court.

REASONS FOR ADVANCING THE CASE.

I. Because this case was before this Court at the March Term, 1895, and dismissed, and because the record now as then fails to show any violation of the Federal laws.

II. Because the record shows that this is a criminal case, and as such, under the Revised Statutes of the United States, s. 710, and the rules of this Court, is entitled to precedence.

III. Because the record shows that the appellant, Theodore Lambert, is under sentence of death in the State of New Jersey for the crime of murder.

IV. Because the record shows that the appellant, Theodore Lambert, was tried, convicted and sentenced under and by virtue of the laws of the State of New Jersey.

V. Because the record shows that the appellant, Theodore Lambert, after sentence, applied for relief to the Supreme Court of the State of New Jersey, under and by virtue of the laws thereof, and was duly heard and relief denied.

VI. Because the crime of murder for which the appellant, Theodore Lambert, is now under sentence of death, was committed on the fourth day of December, 1893.

VII. Because every right, privilege and assistance was accorded the said Lambert under the Constitution and laws of the State of New Jersey.

VIII. Because the record nowhere suggests that a Federal question is involved.

IX. Because the record nowhere alleges that the appellant, Theodore Lambert, was not tried, convicted and sentenced in accordance with "due process of law;" nor is the denial of any specific "right, privilege or immunity" under and by virtue of the Constitution and laws of the United States anywhere alleged.

X. Because a cursory inspection of the record discloses that the appeal was taken for purposes of delay.

Respectfully submitted,

WILSON H. JENKINS,

Attorney for Appellee, and Prosecutor of the Pleas.

Office Supreme Court U. S.
FILED.
NOV 7 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1895.

TERM NO. 771.

THEODORE LAMBERT,
Appellant,

vs.

GEORGE BARRETT, Sheriff of Camden County, N. J.,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

Brief of JOHN L. SEMPLE,
Attorney and Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

October Term, 1895.

No. 771.

Theodore Lambert, Appellant, vs. George Barrett, Sheriff of Camden County, N. J., Appellee.	On Habeas Corpus.

Brief of JOHN L. SEMPLE, Counsel for Appellant.

STATEMENT.

This is an appeal from the judgment of the Honorable Edward T. Green, Judge of the District Court of the United States for the District of New Jersey, sitting as in the Circuit Court of the United States, denying a writ of habeas corpus to bring up the body of Theodore Lambert, the appellant in the above cause.

The record in the case discloses that Theodore Lambert was convicted of the murder of William Kairer in the Camden County Court of Oyer and Terminer and general

jail delivery, by the verdict of a jury on June 15th, 1894; sentence of death was imposed by said Court October 13th, 1894, to be executed on the thirteenth day of December then next. That on December 4th, 1894, the Governor of the State of New Jersey granted a reprieve suspending the execution of said sentence until January 3d, 1895. That on December 22d, 1894, a certain death warrant was issued by the Governor commanding the appellee to execute the said appellant on January 3d then next. On December 29th, 1894, application was made to the Honorable George M. Dallas, Judge of the Circuit Court of the United States for the District of New Jersey, for a writ of *habeas corpus*, which was denied, and on January 2d an appeal was taken to this Court. That on the same day a citation was issued to said appellee, together with a restraining order by Mr. Justice Shiras, of this Court, staying the execution of said appellant "until the further order of this Court." (See copy of order in printed record, page 3.)

That said appeal was heard in this Court on March 25th, 1895, and was dismissed for want of jurisdiction. That a mandate to that effect was duly issued by the clerk of this Court, but was never filed nor any entry of final judgment ever made in the Circuit Court of the United States for the District of New Jersey.

That on May 28th, 1895, the Governor of New Jersey issued another certain death warrant to the appellee, directing the execution of the death sentence upon the said appellant on June 27th then next (see copy of death warrant, pg. 3 in printed record). That on June 18th, 1895, application was made to the Supreme Court of New Jersey for a writ of *habeas corpus* and the same granted, but as the entire record was not before the Court and the order made therein unsatisfactory, a further application was made on June 18th, 1895, to the United States Circuit Court, for a writ of *habeas corpus*, and upon the refusal to grant the same an appeal was taken to this Court.

ARGUMENT.

I.

It is contended that the restraining order made by Mr. Justice Shiras on January 2d, last, staying the execution of appellant until the further order of this Court, has never been vacated, and remains in full force and effect.

That the supersedeas order was allowed as an incident to an appeal actually taken, and while the appeal was dismissed, the supersedeas still retains its legal effect until a motion is made and granted to vacate the same.

In the case of Baughman v. Superior Court of Cal., 72 Cal. Rep., 574, it was held that though a bill upon which the appointment of a receiver is made, is afterwards dismissed, he continues liable until he is discharged by order of the Court.

Also Bond v. Pocheco, 30 Cal., 530.

Ireland v. Nichols, Howards', Prac. Rep., 85.,

Encyclopædia of Pl. & Practice, vol. 2, page 326.

As stated by Mr Justice Waite in Spraul v. Louisiana, 123 U. S., 516, 518, "The supercedeas provided for in §1007 of the Revised Statutes stays process for the execution of the judgment or decree brought under review by the writ of error or appeal to which it belongs."

It was not the appeal that was the obstacle in the way of the execution of the appellant, but the separate and distinct order which operated as a supersedeas and stay of execution. And this is what the counsel for the appellee should have removed but failed to do, and until it is done, the supersedeas has the legal effect of a stay of execution. State v. Proctor, 4 So. Car. Rep., 562.

The next question to be considered is whether Mr. Justice Shiras had jurisdiction to grant said supersedeas, or whether the same was granted without authority of law?

I submit that he had power to grant such an order and

refer to §726, §914, §917, §999, §1000, §1002, §1003, §1007 of the Revised Stat. of U. S.

See also Hudson v. Parker, 156 U. S., 277.

In re Clausen, 140 U. S., 200

In the latter case the Court remarks that "The allowance of the supersedeas was therefore proper, and the motion to set aside is denied. But to remove all doubt, we have adopted a general rule. (See Rule 36 of Supreme Court.)

This rule (36) was not certainly intended to apply to appeals from a Circuit Court, because at the time said rule was promulgated, the Court had already decided that such an appeal on the authority of §766 of Revised Statutes of United States acted as an absolute statutory stay of proceedings, and no supersedeas or stay was necessary to such an appeal.

In re Jugiro, 140 U. S., 295.

II.

It is further contended that by virtue of section 766 of the Revised Statutes of the United States, which provides that until final judgment therein any proceedings against the person of appellant under State authority shall be null and void, final judgment should have been entered in the United States Circuit Court for the District of New Jersey upon the mandate issued by this Court and filed in said Circuit Court. Without this mandate the Judges of the Circuit Court to whom the same was directed have no judicial notice of what disposition was made of the cause and until they are informed there can be no final judgment and the jurisdiction of the State authorities is restrained pending proceedings in the United States Courts and until final judgment. McKane v. Darster, 153 U. S., 684. The State authorities purposely ignored the Circuit Court of the United States and the law of the land. True, a mandate was issued by this Court to the Judges of the Circuit Court,

whom it never reached, but not to the State authorities who disregarded and refused to obey the law as embraced in the aforesaid section 766. Besides Rule 24, § 5, of this Court, provides:

"In all cases of the dismissal of any suit in this Court it shall be the duty of the Clerk to issue a mandate or other proper process in the nature of a *procedendo*, to the Court below, for the purpose of informing such Court of the proceedings in this Court, so that further proceedings may be had in such Court as to law and justice may appertain." —Rules of Supreme Court, page 21.

As the judgment appealed from in this cause was not affirmed, but the appeal dismissed, I submit, that in pursuance of the requirements of the above rule and the statutes referred to the mandate should have been filed in said Circuit Court and final judgment entered thereon, and the issuing of a death warrant by the Governor of New Jersey, in the absence of such proceeding, to put said applicant to death, is absolutely null and void.

III.

The next inquiry which presents itself for consideration, is whether the death warrant issued by the Governor of New Jersey, on May 28, 1895, is not null and void and a violation of the fourteenth amendment to the Constitution of the United States, to put appellant to death by means of said warrant, in that the State would thereby deprive him of his life without due process of law.

The authority of the Governor of New Jersey for issuing a death warrant is found in Article five, Section nine, of the Constitution of the State of New Jersey, which provides:

"The Governor or person administering the Government, shall have power to suspend the collection of fines and forfeitures, and to grant *reprieves*, to extend until the expiration of a time not exceeding *ninety days after convic-*

tion ; but this power shall not extend to cases of impeachment."

Also Section 123 of the Criminal Procedure Act, Revised Statutes of New Jersey, which declares:

"When a reprieve shall be granted by the Governor, or person administering the government, to any convict sentenced to the punishment of death, and such convict shall not be pardoned, it shall be the duty of the said Governor, or person administering the government, to issue his warrant to the Sheriff of the proper county, commanding him to execute the sentence at such time as shall therein be appointed and expressed; which warrant shall be transmitted to said sheriff at the expense of the State."

It will be observed that the death warrant issues as an incident to the reprieve. If there is no reprieve, there can be no warrant of execution, and it is contended that there is no authority in law to issue either, except it be done within the time prescribed by the Constitution —ninety days after conviction.

I submit that after the constitutional limitation had expired, the Governor had no further jurisdiction over the said appellant, and any process issued by him for the purpose of executing the death sentence, is without authority of law and void.

It is contended that the proper practice founded upon legal authority, is to have said appellant brought before the trial Court and a new date fixed for the execution.

As there is no other authority in New Jersey, other than above referred to, we must advert to the Common law, and the case of Rex vs. Garside, 2 Adolphus & Ellis' (Eng.) Rep. 266, is right in point. The prisoner had been respited from time to time when he was finally brought into Court and another day fixed for the execution. The Court said, "Supposing the day appointed by the judgment for execution should lapse before such execution done, we are of opinion that a new time may be appointed for the execution, either by the High Court of Parliament, before

which such Peer shall have been attainted, or by the Court of Kings Bench, the record of the attainder being properly removed into that Court."

"If the time of the execution passes and it is not done, or if the condemned man comes to life after he is hanged, another day should be assigned, the prisoner being taken before the tribunal for the purpose."

Bishop Crim. Proc. (new) vol. 1 § 1311.
Bishop Crim. Law (new) vol. 1 § 952.
Archbold's Cr. Pr. & Pl., page 634.
Col. Sup. Court, 35 P. 179.

"The judgment of death can be only satisfied by actual execution or a pardon, and where the sentence of death was not executed in consequence of the death of the sheriff the court assigned another day."

2 Hawkins' Pleas of Crown, 2 bk., ch. 51, sec. 1.
Foster's Crown Laws, page 40.
Rex v. Radcliffe, 9 Hargraves' State Trials, 582.
25 Geo. II, c. 37.
Doyle case, 1 Leach, 67.
Bland v. State, 2 Ind., 608.
State v. Addington, 23 Am. Dec., p. 150.
State v. Smith, 19 Am. Dec., 679.
People v. Murphy, 25 Col., 137.
State v. Kitchen, 2 Hill S. C., 612.
Aaron v. State, 40 Ala., 308

The above is contended to be the practice and law of New Jersey and the Governor can only exercise his prerogative within the Constitutional period, outside of which his act is void and without jurisdiction. It is contended on behalf of the appellant that the death warrant of the Governor, which would deprive him of his life, is void in pursuance of the above authorities, and is repugnant to the fourteenth amendment to the Constitution of the United States, which is in the following words: "Nor shall any

State deprive any person of life, liberty or property without due process of law."

Such repugnancy is found in the proposition that the Governor had no jurisdiction to issue the death warrant and therefore it is not due process of law and he derives no authority from the Legislative powers or under the Constitution to exercise such prerogative after the constitutional limit of ninety days has passed.

It is conceded that the vital question at issue here is, whether a federal question is involved on this appeal. I maintain the affirmative, and that it comes squarely within the purview of section 753 of the Revised Statutes of the United States, which extends to a prisoner in jail in violation of the Constitution or of a law or treaty of the United States.

In the present case appellant is in custody in violation of the Constitution of the United States because he stands condemned to die without legal process, contrary to the law of the State of New Jersey and in violation of the principles of the Federal Constitution.

In the case of in re Neagle, 135 U. S., page 1, this Court uses the following language: "A person who is in custody for an act done or omitted in pursuance of a law of the United States or of an order, process or decree of a court or judge thereof, or is in custody in violation of the Constitution or a law or treaty of the United States may, under the provision of Revised Statutes, section 753, be brought before any Court of the United States or justice or judge thereof, by writ of *habeas corpus* for the purpose of an inquiry into the cause of the detention; and the Court or justice or judge is required, by section 761, to proceed, in a summary way, to determine the facts of the case by hearing the testimony and arguments and thereupon to dispose of the party as law and justice require."

And the aid of the Circuit Court of the United States for the purpose of this summary investigation may be in-

voked prior to the trial in the State Court or subsequent to the trial and conviction. The Circuit Court has the power to wrest the prisoner from the custody of the State officers in advance of his trial in the State court if he is restrained of his liberty in violation of the national Constitution.

Ex-parte Royall, 117 U. S., 249.

And in the case of in re Frederick, 149 U. S., 73, the Court said: "Although this Court may put a party to his writ of error rather than interfere by *habeas corpus*, nevertheless, it has the *power* if it see fit to do so, to proceed summarily by *habeas corpus* to determine whether the petitioner is illegally restrained. And if it appear that the process by which the prisoner is detained, be not merely erroneous, but is absolutely void, a writ of *habeas corpus* should be issued instanter, if the Court to which the application is made is vested with jurisdiction."

Mr. Justice Bradley, speaking for the court in ex parte Siebold, 100 U. S., 371, 375, as follows: "The only ground on which this court or any court without some specal statute authorizing it will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the *want of jurisdiction in such court over the person or the cause* or some other matter rendering its proceedings void. Where personal liberty is concerned the judgment of an inferior court affecting it is not so conclusive, but that the question of its authority to try and imprison the party may be reviewed on *habeas corpus* by a Superior Court or judge having power to award the writ."

The same doctrine is adhered to in the following authorities:

Ex parte Lange, 18 Wallace, 163.
In re Medley, 134 U. S., 160.
In re Savage, 134 U. S., 176.

It is therefore contended in pursuance of the forego-

ing authorities that the constitutional limit of time in which the Governor of the State could issue a death warrant having expired, his power was exhausted and further exercise of the same no longer existed. That the Governor was without jurisdiction over the person or cause of appellant and that the said death warrant was absolutely void in law.

Such being the case, the death warrant is not due process of law within the meaning and intent of fourteenth amendment to the Federal Constitution and to execute appellant upon such process would be a violation of the same.

It is further contended that the granting of the reprieve is the authority under the statute of the State for issuing the death warrant, and as there was no reprieve granted within ninety days from May 28 last, the date of the warrant, there can be no death warrant issued without violating the Constitution of the United States and the laws of New Jersey.

I insist that the proper remedy in this matter is by application to the Circuit Court for writ of *habeas corpus* to determine whether the Federal Constitution and a statute of the United States had been violated, and whether it was contemplated to disobey and ignore a restraining order of this Court.

I respectfully submit that the questions here presented are of a Federal nature and the writ of *habeas corpus* is the proper mode of procedure in bringing the same to the attention of the Court. That the judgment of the Circuit Court in denying a writ of *habeas corpus* was error and that the same should be reversed.

JOHN L. SEMPLE,
Attorney and Counsel for Appellant.

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CLERK.

Supreme Court of the United States.

October Term, 1895.

Term No. 771

THEODORE LAMBERT,

Appellant.

AGAINST

GEORGE BARRETT, SHERIFF OF CAMDEN COUNTY, NEW JERSEY,

Appellee.

BRIEF.

Appeal from the Circuit Court of the United States for the District of New Jersey.

WILSON H. JENKINS,
Attorney for Appellee,
and Prosecutor of the Pleas.

Supreme Court of the United States

THEODORE LAMBERT,

Appellant,

against

GEORGE BARRETT, Sheriff of Camden County, New Jersey,

Appellee

BRIEF.

STATEMENT OF FACTS.

The Supreme Court of the United States has decided this case once. The decision is found in 157 U. S., 697. The appeal was dismissed because the case was destitute even of the semblance of a Federal question.

The mandate was sent to Mr. Jenkins, attorney for appellee, and by him forwarded to the Honorable George T. Werts, Governor of the State of New Jersey. Upon the assurance of this mandate the Governor, on the 28th day of May, last past, issued another death warrant, directing the Sheriff of the County of Camden to execute Lambert on the 27th day of June.

The same old expedients were again tried, one after the other, to stave off the execution. June 11th, an application was made to the Supreme Court of the State of New Jersey for a writ of *habeas corpus*, on the ground that the Court and not the Governor should have designated the day for the execution. The following order was made:

NEW JERSEY SUPREME COURT.

THEODORE LAMBERT,
Petitioner,
and
GEORGE BARRETT, Sheriff, &c.,
Defendant.

ON WRIT OF HABEAS CORPUS.

ORDER.

The writ in this cause having been returned into Court, the production of the body being waived, and the cause having been heard by the Court, the Court on the eleventh day of June, 1895, doth adjudge that the warrant of the Governor was properly issued, and that from the return to the writ and the facts appearing to the Court, the prisoner is properly in custody and his discharge is refused.

Let this rule be entered in the minutes of the Court, June 11th, 1895.

B. VAN SYCKEL,
Justice Supreme Court.

That order disposed of the matter so far as State issues were concerned. June the 18th counsel for the appellant was again in Trenton. He might have applied to the Honorable Alexander T. McGill, Chancellor of the State, for a writ of error. The issuance of the writ, however, was discretionary with the Chancellor. But to quote from appellant's brief, p. 2, bottom: "As the entire record was not before the Court" (i. e. the State Court) "and the order made therein *unsatisfactory*, a further application was made on June 18th, 1895, to the United States Circuit Court for a writ of *habeas corpus*, and upon the refusal to grant the same an appeal was taken to this Court." Observe, then, because the record in the State Court was incomplete and its order unsatisfactory, not the Chancellor of the State, but a Justice of the United States Courts, is appealed to.

On the same day, June 18th, the Governor filed the mandate with the Clerk of the United States District Court for the District of New Jersey. Mr. Justice Green was aware that the mandate had been issued, and, indeed, it was at his instance that it was filed by the Governor. Mr. Semple, the attorney and counsel for the appellant, was fully aware that the mandate had been issued. Indeed, he consented in writing to its being issued.

ARGUMENT.

I.

The order made by Mr. Justice Shiras, on January 2, 1895, directs that "the execution of the said Theodore Lambert be and the same is hereby stayed until the further order of this court." A "further order" was made in the form of a mandate, which informed the State authorities that they might proceed with the execution of Lambert, all Federal restraint upon their action having been removed.

Furthermore, even if that order may still be said to be, *pro forma*, alive, the only authority to support such an order in such a case as this, must be found in section seven hundred and sixty-six of the Revised Statutes. When the requirements of that section were satisfied, as they were in this case, when the Court decided the appeal on its merits, then the State of New Jersey was free to proceed with the execution of Lambert, whether the order of January 2d had been vacated or not. "This Court, as we know from "our own records, affirmed, with costs, the judgment of the "Circuit Court, denying the former application for a writ of "*habeas corpus*. That was its final judgment in the premises, "because it determined the whole controversy involved in "the appeal. Upon its rendition the appeal from the judg-"ment of the Circuit Court was no longer pending in this "Court, and nothing remained that was 'in process of being "heard and determined.' * * * As Congress went no 'further than to stay the hands of the State Court until

"final judgment, we cannot superadd the condition, that "the filing of the mandate in the Circuit Court—in case of "the mere affirmance of its judgment refusing a writ of "*habeas corpus*—is absolutely necessary before the State "Court can proceed in the execution of the judgment,"—In Re Jugiro 140 U. S., pp. 295, 296. Though the judgment in the Supreme Court of the United States took the form of a dismissal of the appeal, it was none the less a final disposition of the merits of the case. The mandate was issued, hence *a fortiori* the State authorities were free to proceed with the execution of Lambert on the appointed day, June 27th

II.

In Re Jugiro, 140 U. S. 291 fully answers point two of appellant's brief.

Moreover, Mr. Justice Green was aware that the mandate had been issued. Again, had the matter been open for argument in the Circuit Court, on the motion for the writ of *habeas corpus*, the Justice would have been bound to take judicial notice of the decision of the Supreme Court of the United States in this case.

III.

Concerning the point whether the Governor had power to issue another death warrant, we submit this is a matter for the State Courts. It has none of the characteristics of a Federal question. The decision of the State Supreme Court upon this point was final. We forbear the citation of authorities or the use of argument upon a point so well established, as to what is and what is not a Federal question.

Respectfully submitted,

WILSON H. JENKINS,

Attorney for the Appellee, and
Prosecutor of the Pleas.